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IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-846

E. DALE SALL, Director of the Department of Agriculture of the State of Michigan,
RONALD M. LEACH, Acting Chief of the Food Inspection Division of the Michigan Department of Agriculture, and
FRANK J. KELLEY, Attorney General of the State of Michigan,
Petitioners,

v.

ARMOUR AND COMPANY, a Delaware Corporation,
WILSON & CO., INC., a Delaware Corporation, and
GEO. A. HORMEL & COMPANY, a Delaware Corporation,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR RESPONDENTS IN OPPOSITION AND APPENDIX

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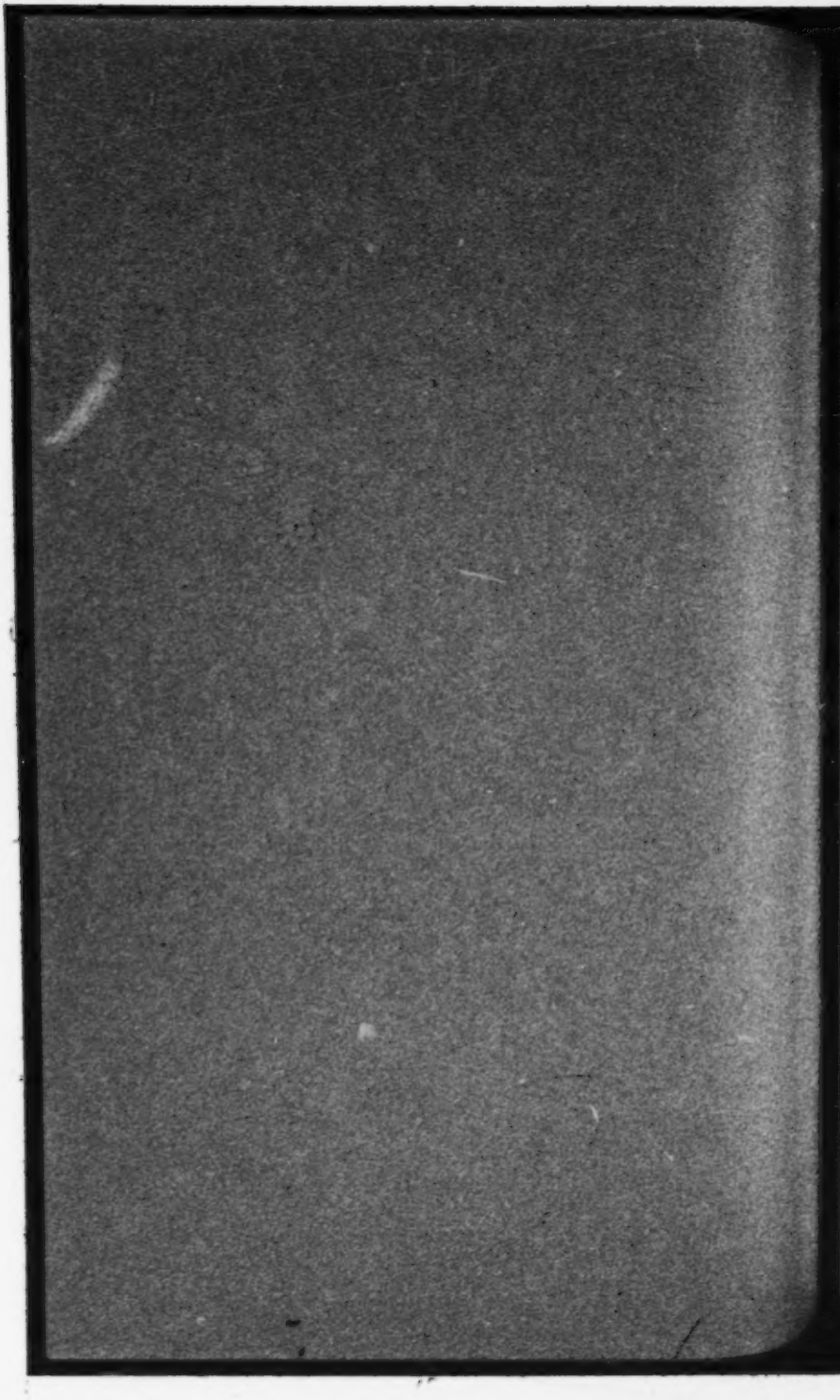

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OPINIONS BELOW

The opinion of the District Court (petitioners' Appendix, p. 1a *et seq.)* is unreported. The opinion of the Court of Appeals for the Sixth Circuit (petitioners' Appendix, p. 15a *et seq.)* is likewise unreported.

JURISDICTION

The Petition adequately sets forth the requisites for jurisdiction.

QUESTIONS PRESENTED

1. Whether the labeling and ingredient requirements of the Michigan Comminuted Meat Law may constitutionally be applied to meat products manufactured at federally inspected plants outside of Michigan for sale within the state, when the federal Wholesome Meat Act provides that no state may impose labeling or ingredient requirements "in addition to, or different than" those imposed by regulations adopted pursuant to the act with respect to such meat products.

2. Whether Congress, acting pursuant to its power to regulate interstate commerce, has power to provide that no state may impose labeling or ingredient requirements "in addition to, or different than" those imposed by regulations adopted pursuant to the federal Wholesame Meat Act with respect to meat products transported in interstate commerce.

3. Petitioners' question No. 3—"Whether a Federal District Court should abstain from issuance of an injunction against enforcement of a state criminal statute where no irreparable harm can be established"—, has no relevance to the case at hand because the Court of Appeals did not hold that respondents were entitled to injunctive relief without a showing of threatened irreparable injury.

4. Whether respondents lack "equity and good conscience" and are therefore not entitled to declaratory relief.

STATUTES AND REGULATIONS INVOLVED

The provisions of the federal Wholesome Meat Act, 21 U.S.C. § 601 *et seq.*, are set forth in petitioners' Appendix at pp. 53a-118a. The text of the Michigan Comminuted Meat Law, M.C.L.A. § 289.581 *et seq.*, M.S.A. § 12.964 (1) *et seq.*,[1] are set forth in petitioners' Appendix at pp. 40a-53a. Relevant sections of the federal regulations prescribed by the Secretary of Agriculture, 9 C.F.R. §§ 319.-140-144 & 319.180, are set forth in respondents' Appendix.

STATEMENT OF THE CASE

Plaintiffs-respondents, Armour and Company, Wilson & Company, Inc. and Geo. A. Hormel & Company, manufacture sausage products[2] at federally inspected plants outside Michigan for sale at wholesale and retail in Michigan. These sausage products must meet the labeling, packaging and ingredient requirements imposed by regulations issued by the Secretary of Agriculture pursuant to the federal Wholesome Meat Act, 21 U.S.C. § 601 *et seq.*

The Michigan Comminuted Meat Law, M.C.L.A. § 289.-581 *et seq.*, M.S.A. § 12.964 (1) *et seq.*, likewise imposes labeling, packaging and ingredient requirements for sausage products. Defendants B. Dale Ball and Ronald M. Leach, the Director of the Department of Agriculture of

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[1] References are to Michigan Compiled Laws Annotated and to Michigan Statutes Annotated, respectively.

[2] There are several kinds of sausage involved, including frankfurters, bologna and Vienna sausages.

the State of Michigan and the Chief of the department's Food Inspection Division, respectively, are charged with enforcing the act. After December 15, 1967, the effective date of the federal act, defendants continued to enforce, as against plaintiffs' sausage products, certain labeling and ingredient requirements of the Michigan act, notwithstanding the mandate of Section 408 of the federal act, 21 U.S.C. § 678, which declares that:

> . . . marking, labeling, packaging, or ingredient requirements in addition to, or different than, those made under this chapter may not be imposed by any State . . . with respect to articles prepared at any [federally inspected] establishment . . .

The requirements of the Michigan act that defendants have continued to enforce against plaintiffs include, (1) a labeling requirement that all sausage of the kind involved here have the designation "Grade 1" applied to its package; (2) a labeling requirement that the name and address of the processor appear on the package of all sausage products, even though the label discloses the processor's trademark and the name and address of the distributor; and (3) an ingredient requirement that all sausage contain not less than 12% protein.[3]

Plaintiffs brought this suit for declaratory[4] and injunctive relief in the United States District Court for the Western District of Michigan. They asked for a determination that the labeling and ingredient requirements of

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[3] The labeling requirements are in addition to the requirements prescribed by the federal act and the Secretary. Although the federal regulation, 9 C.F.R. § 319.180, does not refer to protein, by fixing the requirements for other ingredients, it establishes a protein requirement of 11.2%.

[4] Pursuant to 28 U.S.C. § 2201.

the Michigan act are "in addition to, or different than" those imposed by regulations adopted pursuant to the federal act, and that the state may not therefore impose such requirements because Congress intended and directed that the federal requirements be the only requirements applicable to plaintiffs' sausage products. They asked, in addition, that defendants be enjoined from enforcing the requirements of the state act against them insofar as their sausage products are subject to the requirements imposed by the federal regulations.

Defendants answered, admitting that they had continued to enforce the requirements of the Michigan act against plaintiffs. No prosecution under the Michigan act was pending against any of the plaintiffs when they began this suit.[5]

Both plaintiffs and defendants moved for summary judgment. The cause was submitted to the District Court on the complaint, answer, affidavits, a short stipulation, the motions for summary judgment, briefs and oral argument. The Court denied plaintiffs' motion and granted defendants'.

Notwithstanding that plaintiffs and defendants had agreed that the only question was whether Section 408 of the federal act foreclosed defendants from enforcing the labeling and ingredient requirements of the state act against plaintiffs' sausage products, the District Court

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[5] In 1968, before this suit was filed, plaintiff Amour and Company was prosecuted for violation of the Michigan act. The prosecution ended with a guilty plea and payment of a fine. Over two years after plaintiffs filed this suit, Amour was again prosecuted. That prosecution has been held in abeyance pending a final decision in this suit. An Amour subsidiary, not a party to this suit, is also the subject of a pending prosecution begun approximately one year after this suit was begun. That prosecution has also been held in abeyance.

held that plaintiffs were required to show that enforcement of the state act would irreparably injure them in order to sue for declaratory or injunctive relief, that plaintiffs had failed to show that they would be irreparably injured by the enforcement of the act, and that plaintiffs were not entitled to declaratory or injunctive relief because they lacked "equity and good conscience."

The Court of Appeals for the Sixth Circuit reversed. Relying on *Lake Carriers' Ass'n* v. *MacMullan*, . . . U.S. ....., 32 L. Ed.2d 257 (1972), the Court held that plaintiffs were not required to show threatened irreparable injury in order to sue for a declaratory judgment that the state act had been preempted because no prosecution under the statute was pending against any of them when the suit was brought. The Court did not, as petitioners misstate that it did, hold that plaintiffs were entitled to ininjunctive relief without first showing that enforcement of the state act would irreparably injure them.

So far as preemption, the Court held that the regulations issued by the Secretary of Agriculture pursuant to Section 7 of the federal act, 21 U.S.C. § 607, established marking, labeling and ingredient requirements for the meat products to which they apply, that the marking, labeling and ingredient requirements imposed by the Michigan law were "in addition to, or different than" the federal requirements established by the regulations, and that the marking, labeling and ingredient requirements of the Michigan act were therefore, under Section 408 of the federal act, 21 U.S.C. § 678, preempted by the federal regulations.

ARGUMENT

1. THERE IS NO SUBSTANTIAL FEDERAL QUESTION REQUIRING REVIEW BY THIS COURT SINCE THE COURT OF APPEALS WAS CLEARLY RIGHT IN HOLDING THAT THE LABELING AND INGREDIENT REQUIREMENTS OF THE MICHIGAN LAW MAY NOT CONSTITUTIONALLY BE APPLIED TO MEAT PRODUCTS MANUFACTURED OUTSIDE THE STATE FOR SALE IN MICHIGAN.

The decision by the Court of Appeals does not conflict with any decision by any other court of appeals, or with applicable decisions of this Court, nor is there any substantial federal question requiring review by this Court because the decision was clearly right and conforms to this Court's ruling in *Florida Lime & Avocado Growers, Inc.* v. *Paul,* 373 U.S. 132, 142 (1963), that federal regulation preempts state regulatory power in cases where "Congress has unmistakably so ordained."

A. The Ingredient Requirements Referred to by Section 408 of the Federal Act are the "Definitions and Standards of Identity or Composition" Imposed by the Regulations Adopted by the Secretary of Agriculture Pursuant to Section 7 of the Federal Act.

Section 10(b) of the federal Wholesome Meat Act, 21 U.S.C. § 610(b), forbids the sale or transportation of "misbranded" meat products in commerce. According to Section 1(n) (7) of the act, 21 U.S.C. § 601 (n) (7), a product is "misbranded" if it purports to be or is represented as a food product for which a "definition and standard of identity or composition" has been prescribed by regulations of the Secretary of Agriculture under Section 7 of the act, and does not conform to the definition and standard prescribed.

Section 7 of the federal act, 21 U.S.C. § 607, deals with marking and labeling and, in addition, authorizes the Secretary to establish "definitions and standards of identity or composition" for meat products. The Secretary has by regulation prescribed such definitions and standards of identity or composition, and these, as the Court of Appeals held, establish ingredient requirements for the meat products to which they apply. See 9 C.F.R. § 319.1 *et seq.* These ingredient requirements are the "ingredient requirements" referred to by Section 408 of the federal act, 21 U.S.C. § 678, which provides that a state may not impose "ingredient requirements in addition to, or different than, those made under [the federal act]," with respect to articles prepared at any federally inspected establishment.

Defendants argue that the "definitions and standards of identity or composition" that Section 7 of the act authorizes the Secretary to prescribe must have the "purpose of informing consumers of the nature of the product by requiring honest labels," and apparently infer that he may not establish "ingredient" or "nutritional" requirements. (Petition, p. 10)

First of all, the federal act does authorize the Secretary to establish "ingredient" requirements for meat products. The evidence of this is that Section 408 of the act provides that states may not impose "ingredient requirements" which are "in addition to, or different than" those imposed pursuant to the act. If the Secretary is not authorized to establish ingredient requirements, then Section 408's reference to "ingredient requirements" is meaningless.

If, as Section 408's reference to "ingredient requirements" necessarily establishes, "ingredient requirements" may be imposed by regulations adopted by the

Secretary, then those "ingredient requirements" must be the "definitions and standards of identity or composition" that Section 7(c) (2) of the act authorizes the Secretary to prescribe "whenever he determines such action is necessary for the protection of the public." This is obviously so because the requirements he may impose pursuant to Section 7 (c) (2) are the only requiremtnts that he is authorized to impose pursuant to the act that may be described as "ingredient requirements."

The Secretary's authority to establish "ingredient" requirements pursuant to Section 7 (c) of the act may be inferred from the section's reference to "definitions and standards of identity *or composition.*" As the Court of Appeals held, the plain meaning of the term "composition" is the mix of ingredients making up the meat product.

Moreover, Section 7(c) (2) authorizes the Secretary to prescribe "definitions and standards of identity or composition . . . not inconsistent with any such standards established under the Federal Food, Drug, and Cosmetic Act. . . ." Congress thus meant for the Secretary to have authority to adopt the same "definitions and standards of identity" as the Administrator may establish pursuant to the Food, Drug and Cosmetic Act. In *Federal Security Administrator v. Quaker Oats Co.*, 318 U.S. 218 (1943), this Court held that the Food, Drug and Cosmetic Act authorized the Administrator to adopt a "definition and standard of identity" for farina which established ingredient requirements for the product, and that his authority was not limited to preventing false and misleading labeling:

> . . . [I]t was found that such a prohibition [against false and misleading labeling] was inadequate to protect the consumer from "economic

> adulteration," by which less expensive ingredients were substituted, or the proportion of more expensive ingredients diminished, so as to make the product, although not in itself deleterious, inferior to that which the consumer expected to receive when purchasing a product with the name under which it was sold. . . . The remedy chosen was not a requirement of informative labeling. Rather it was the purpose to authorize the Administrator to promulgate definitions and standards of identity "under which the integrity of food products can be effectively maintained". . . . 318 U.S. at 230.

What was held with respect to the Food, Drug and Cosmetic Act applies equally to regulations adopted pursuant to Section 7(c)(2) of the Wholesome Meat Act, and we must therefore infer that the Secretary has authority to establish ingredient requirements by the "definitions and standards of identity or composition" which that section authorizes him to prescribe.

An examination of the federal regulations discloses that they do require more than honest labeling—that they impose ingredient requirements designed to maintain the integrity of the meat products to which they apply. So far as sausage of the type in issue here, 9 C.F.R. § 319.180 provides that they shall not contain (a) more than 30% fat, (b) more than approximately 4% binders, seasonings and other permitted additives, and (c) more than 10% added water. Although no reference is made to protein, the regulation, by fixing the requirements for other ingredients, does establish a protein requirement of 11.2%. Since the product may contain no more than 44% fat, added water and binders, seasonings and other permitted additives, 56% of the product must consist of protein and natural water. Since meat has four parts of natural water for

each part of protein, 44.8% (80% of 56%) of the product will be natural moisture, and 11.2% (20% of 56%) will be protein.

The foregoing ingredient requirements cannot be understood in terms of informing consumers of the nature of the product. They are, instead, ingredient requirements designed to maintain the wholesomeness and integrity of the meat product.

In support of their argument that the Secretary is authorized only to require "honest labels," defendants rely on Senate Report No. 799, 90th Cong., 1st Sess., 2 U.S. Code Cong. & Ad. News 2188 (1967), and *Houston* v. *St. Louis Independent Packing Co.*, 249 U.S. 479 (1919). At the very most, the Senate Report and the *Houston* case suggest that the federal act and regulations are aimed at requiring that meat products have the ingredients that consumers expect them to have. Conceding that the Secretary may thus be required to look to what ingredients consumers expect "sausage" products to have when he prescribes ingredient requirements, and that the requirements of the state act may have been determined by what the Legislature believed consumers should receive in the way of nutritional value, regardless of their expectations about "sausage" products, the fact still remains that the Secretary is authorized to prescribe, and has prescribed, "ingredient" requirements. Since the Secretary has prescribed "ingredient" requirements, Section 408 of the act applies to preempt any requirements of the state act "in addition to, or different than" the federal requirements.

B. The Requirements of the Michigan Act Are "in Addition to, or Different Than" Those Imposed by Regulations Adopted Pursuant to the Federal Act, and Are Therefore Preempted by Section 408 of the Federal Act.

So far as ingredients are concerned, Section 3 of the Michigan act, M.C.L.A. § 289.583, M.S.A. § 12.964(3), requires the sausage products here involved to meet the specifications for "Grade 1 sausage." Section 2(a) of the act, M.C.L.A. § 289.582(a), M.S.A. 12.964 (2)(a), provides that Grade 1 sausage shall consist only of skeletal fresh meat from cattle, swine or sheep, or the striated muscle of chicken or turkey. On the other hand, 9 C.F.R. § 319.180 authorizes the use of "meat byproducts," which include "any part capable of use as human food, other than meat." 9 C.F.R. § 301.2(uu).

With the exception of pork sausage, breakfast sausage or roasted sausage, the Michigan statute requires a protein content of not less than 12%. M.C.L.A. § 289.582(a)(1), M.S.A. § 12.964(2)(a)(1). As explained above, although 9 C.F.R. § 319.180 does not refer to protein, if the other ingredient requirements are met, a protein requirement of 11.2% results.

The Michigan statute forbids the addition of water to sausage. M.C.L.A. § 289.582(a)(1), M.S.A. § 12.964(2)(a)(1). The federal regulation, 9 C.F.R. § 319.180, however, permits 10% of added water.

So far as labeling, Section 4 of the Michigan act, M.C.L.A. § 289.584, M.S.A. § 12.964.(4), requires the name and address of the manufacturer to be plainly marked on each package. On the other hand, 9 C.F.R. § 317.2(c) (3) permits use of the name and place of business of the manufacturer, packer or distributor.

The foregoing are some of the requirements imposed by the state act that are obviously additional to or different than the requirements prescribed by the Secretary pursuant to the federal act. Others are collected and analyzed by the Court of Appeals in the appendix to its opinion.

Section 408 of the federal act, 21 U.S.C. § 678, declares that:

> . . . Marking, labeling, packaging, or ingredient requirements *in addition to, or different than* those made under this chapter may not be imposed by any State or Territory or the District of Columbia with respect to articles prepared at any establishment under inspection in accordance with the requirements under subchapter I of this chapter, but any State or Territory or the District of Columbia may, consistent with the requirements under this chapter, exercise concurrent jurisdiction with the Secretary over articles required to be inspected under said subchapter I, for the purpose of preventing the distribution for human food purposes of any such articles which are adulterated or misbranded and are outside of such an establishment. . . . [emphasis added]

In *Florida Lime & Avocado Growers, Inc.* v. *Paul*, 373 U.S. 132, 142 (1963), this Court held that federal regulation preempts state regulatory power whenever "Congress has unmistakably so ordained." In this case, Congress has unmistakably ordained that no state shall impose any labeling or ingredient requirements additional to or different than those imposed by the Secretary.

Although the language of section 408 speaks for itself, the fact that Congress meant for the federal labeling and ingredient requirements to be the only requirements applicable to federally inspected meat products may be inferred from its use of identical language in amending

the Poultry Products Inspection Act, 21 U.S.C. § 451 *et seq.*, to provide that:

> . . . Marking, labeling, packaging, or ingredient requirements . . . *in addition to, or different than,* those made under this chapter may not be imposed by any State . . . with respect to articles prepared at any official establishment in accordance with the requirements under this chapter. [emphasis added]

The amendment was added by Public Law 90-42 of August 12, 1968, 21 U.S.C. § 467(e), following the decision of the Court of Appeals in *Swift & Co.* v. *Wickham,* 364 F.2d 241 (2d Cir. 1966) *cert. denied,* 385 U.S. 1036 (1967), that the Poultry Products Inspection Act did not preclude New York from imposing labeling requirements for turkeys in addition to or different than those required by the federal act. The District Court in the *Wickham* case, finding no "unambiguous congressional mandate" that the federal requirements were to be the only requirements, held against preemption, and the Court of Appeals affirmed, agreeing that Congress had not "unmistakably ordained" that the federal act was to preempt state regulation. A fair assumption is that Congress amended the Poultry Products Inspection Act to meet the decision by the Court of Appeals in the *Wickham* case and, by the amendment, unmistakably ordained that the federal requirements were to be the only requirements. So far as meat products subject to the labeling and ingredient requirements of the regulations adopted pursuant to the federal Wholesome Meat Act, we submit that Congress likewise, by section 408 of the act, unmistakably ordained that the federal requirements were to be the only requirements.

Only one appellate court, other than the Court below, has dealt with the effect of Section 408. In *Meat Trade*

Institute, Inc. v. *McLaughlin*, 37 A.D.2d 456, 326 N.Y.S.2d 683 (1971), the Appellate Division of the New York Supreme Court, in a *per curiam* opinion, held that section 408 foreclosed the City of New York from imposing labeling requirements for federally inspected meat products, stating that the section "explicitly ordained that the Secretary of Agriculture has exclusive jurisdiction of the labeling requirements of meat products produced in federally inspected meat packing plants."

C. Section 408 of the Federal Act Preempts Regulation by Both the State in Which the Product is Sold and by the State in Which It Is Manufactured.

In this case, Congress has unmistakably ordained that no state, whether it be the state in which the product is manufactured or the state to which the product is shipped for sale, shall impose any labeling or ingredient requirements additional to or different than those prescribed by the Secretary. A specific exception is made only where public health is endangered by adulteration, or where misbranding occurs, and the federally inspected product is outside of the manufacturer's plant. According to Section 408, a state may then exercise concurrent jurisdiction with the federal authorities "for the purpose of preventing the distribution for human food purposes" of the product. No other exceptions are provided for.

Defendants' suggestion (Petition, p. 10) that Congress intended preemption only at the manufacturing end of the stream of commerce, leaving the states free to continue regulation at the distribution end, is untenable. Not only is the language of Section 408 unqualified by any such limitation, if the section is interpreted as defendants propose, the specific exception authorizing the states to exer-

cise concurrent jurisdiction to prevent the distribution of adulterated or misbranded products once they are outside the manufacturer's plant would have been unnecessary because the exception clearly appears to have been made to enable the state to which the product is shipped to protect local consumers by preventing its distribution. If the section was not meant to preempt any regulation by the state to which the product is shipped for sale, the exception would have been unnecessary.

We submit that Congress meant for meat products manufactured at federally inspected establishments for interstate shipment to be subject to only the labeling and ingredient requirements of the regulations adopted pursuant to the requirements of the Wholesale Meat Act. Article VI of the United States Constitution requires that this direction by Congress be obeyed, and defendants may thus not constitutionally enforce the ingredient and labeling requirements of the Michigan act against plaintiffs' meat products.

2. CONGRESS, ACTING PURSUANT TO ITS POWER TO REGULATE INTERSTATE COMMERCE, HAS POWER TO PROVIDE THAT NO STATE MAY IMPOSE LABELING OR INGREDIENT REQUIREMENTS "IN ADDITION TO, OR DIFFERENT THAN" THOSE IMPOSED BY REGULATIONS ADOPTED PURSUANT TO THE FEDERAL WHOLESOME MEAT ACT WITH RESPECT TO MEAT PRODUCTS TRANSPORTED IN INTERSTATE COMMERCE.

Defendants argue that "The power of Congress under the interstate commerce clause does not authorize it to void traditional state laws enacted to protect the health of its citizens," citing *Pike* v. *Church*, 397 U.S. 137 (1970). (Petition, p. 8) In the *Pike* case, the question was not whether Congress had power "to void traditional state

laws," but was whether the enforcement of an Arizona statute requiring that cantaloupes grown in the state be packaged in closed, standard containers, against a grower shipping interstate resulted in an unconstitutional burden on interstate commerce.

There is no question but that the Commerce Clause authorizes Congress to regulate the ingredients of products shipped interstate, *Hipolite Egg Co.* v. *United States,* 220 U.S. 45 (1913); *United States* v. *Carolene Products Co.,* 304 U.S. 144 (1938). It is likewise beyond question that state law must yield if Congress elects to make its regulation exclusively applicable. *Campbell* v. *Hussey,* 368 U.S. 297, 302 (1961); *Southern Pacific Co.* v. *Arizona,* 325 U.S. 761, 769 (1945); *Cloverleaf Butter Co.* v. *Patterson,* 315 U.S. 148 (1942); *McDermott* v. *Wisconsin,* 228 U.S. 115 (1913). As this Court stated in *Rice* v. *Santa Fe Elevator Corp.,* 331 U.S. 218, 230 (1947):

> Congress may, if it chooses, take unto itself all regulatory authority . . . share the task with the States, or adopt as federal policy the state scheme of regulation. . . . *The question in each case is what the purpose of Congress was.* [emphasis added]

In this case, Congress may therefore require that the states not impose labeling or ingredient requirements "in addition to, or different than" those imposed by regulations adopted pursuant to the federal act with respect to meat products transported in interstate commerce.

3. PETITIONERS' QUESTION No. 3 HAS NO RELEVANCE TO THE CASE AT HAND BECAUSE THE COURT OF APPEALS HELD ONLY THAT RESPONDENTS WERE ENTITLED TO DECLARATORY RELIEF WITHOUT A SHOWING THREATENED IRREPARABLE INJURY.

Defendants' question No. 3—"Whether a Federal District Court should abstain from issuance of an injunction against enforcement of a state criminal statute where no irreparable harm can be established"—, has no relevance to the case at hand because the Court of Appeals did not hold that plaintiffs were entitled to injunctive relief without a showing of threatened irreparable injury. Plaintiffs sued for both declaratory and injunctive relief. The District Court held that they were required to show that enforcement of the state act would irreparably injure them in order to sue for either injunctive or declaratory relief, that they had failed to make the necessary showing, and therefore dismissed the complaint. Relying on *Lake Carriers Ass'n* v. *MacMullan*, ... U.S. ...., 32 L. Ed.2d 257 (1972), the Court of Appeals reversed, holding that plaintiffs were not required to show threatened irreparable injury in order to sue for declaratory relief because no prosecution under the state act was pending against any of them when the suit was brought. The Court did not, as defendants misstate that it did, hold that plaintiffs were entitled to injunctive relief without first showing that enforcemment of the state act would irreparably injure them.

This Court's holding in the *MacMullan* case establishes that a party seeking declaratory relief in the federal courts with respect to a state criminal statute is not required to show threatened irreparable injury unless a proceeding under the statute is pending against him. As the Court of Appeals here held, a pending proceeding means one pending when the suit is brought.

4. PETITIONERS' ARGUMENT THAT RESPONDENTS ARE NOT ENTITLED TO DECLARATORY RELIEF BECAUSE THEY LACK "EQUITY AND GOOD CONSCIENCE" IS UNSUBSTANTIAL.

Defendants argue that certiorari should be granted to review the question whether plaintiffs lack "equity and good conscience" and are therefore not entitled to declaratory or other equitable relief. This argument is so unsubstantial that the Court of Appeals did not deal with or even refer to it.

The District Court held that declaratory relief is equitable relief subject to the generally established rules of equity, that equitable relief may not be had by a party lacking "equity and good conscience" because they were seeking "to avoid the admittedly higher standards of the Michigan act, while offering as their sole reason the maximization of corporation profits." The complete answer to the District Court's holding, and to defendants' argument, is that if Congress directed that plaintiffs were required to comply with only the federal requirements, surely they cannot be said to lack "equity and good conscience" for desiring to comply with only those requirements. If plaintiffs are required to comply with both the federal and state requirements, the additional cost of complying with both will put them at an economic disadvantage in competing with local manufacturers who comply with only the state requirements. Congress, by requiring compliance with only federal requirements, meant to eliminate any such competitive disadvantage.

CONCLUSION

For the foregoing reasons, respondents submit that defendants' petition for a writ of certiorari should be denied.

Respectfully submitted,

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APPENDIX

TITLE 9, CODE OF FEDERAL REGULATIONS, PART 319—DEFINITIONS AND STANDARDS OF IDENTITY OR COMPOSITION

Subpart E—Sausage Generally: Fresh Sausage[1]

§ *319.140 Sausage.*

Except as otherwise provided in this section, or under the Poultry Products Inspection Act with respect to products consisting partly of poultry, sausage is the coarse or finely comminuted meat food product prepared from one or more kinds of meat or meat and meat byproducts, containing various amounts of water as provided for elsewhere in this part, and usually seasoned with condimented proportions of condimental substances, and frequently cured. Certain sausage as provided for elsewhere in this part may contain binders and extenders; e.g., cereal, vegetable starch, starchy vegetable flour, soy flour, soy protein concentrate, isolated soy protein, nonfat dry milk, calcium reduced skim milk or dried milk. The finished product shall contain no more than 3.5 percent of these additives individually or collectively. Two percent of isolated soy protein shall be deemed equivalent to 3½ percent of any one or more of these binders. Sausage may not contain phosphates except that uncooked pork from cuts cured with phosphates listed in § 318.7(c) (4) of this subchapter may be used in cooked sausage. To facilitate chopping or mixing or to dissolve the usual curing ingredients, water or ice may be used in the preparation of sausage which is

[1] 36 F.R. 12004, June 24, 1971.

not cooked in an amount not to exceed 3 percent of the total ingredients in the formula. Cooked sausages such as Polish sausage, cotto salami, braunschweiger, liver sausage, and similar cooked sausage products may contain no more than 10 percent of added water in the finished product.

[35 F.R. 15597, Oct. 3, 1970, as amended at 12004, June 24, 1971]

§ *319.141 Fresh pork sausage*

"Fresh Pork Sausage" is sausage prepared with fresh pork or frozen pork, or both, not including pork byproducts, and may be seasoned with condimental substances as permitted under Part 318 of this subchapter. It shall not be made with any lot of product which, in the aggregate, contains more than 50 percent trimmable fat, that is, fat which can be removed by thorough, practicable trimming and sorting. To facilitate chopping or mixing, water or ice may be used in an amount not to exceed 3 percent of the total ingredients used.

§ *319.142 Fresh beef sausage.*

"Fresh beef sausage" is sausage prepared with fresh beef or frozen beef, or both, not including beef byproducts, and may be seasoned with condimental substances as permitted under Part 318 of this subchapter. The finished product shall not contain more than 30 percent fat. To facilitate chopping or mixing, water or ice may be used in an amount not to exceed 3 percent of the total ingredients used.

§ *319.143 Breakfast sausage.*

"Breakfast sausage" is sausage prepared with fresh and/or frozen meat, or meat and meat byproducts and

may be seasoned with condimental substances as permitted in Part 318 of this subchapter. It shall not be made with any lot of products which, in the aggregate, contains more than 50 percent trimmable fat; that is, fat which can be removed by thorough practicable trimming and sorting. To facilitate chopping or mixing, water or ice may be used in an amount not to exceed 3 percent of the total ingredients used. Extenders or binders as listed in Part 318 of this subchapter may be used to the extent of 3½ percent of the finished sausage as permitted in § 319.-140.

§ *319.144 Whole hog sausage.*

"Whole Hog Sausage" is sausage prepared with fresh and/or frozen meat from swine in such proportions as are normal to a single animal and may be seasoned with condimental substances as permitted in Part 318 of this subchapter. It shall not be made with any lot of product which, in the aggregate, contains more than 50 percent trimmable fat; that is, fat which can be removed by thorough practicable trimming and sorting. To facilitate chopping or mixing, water or ice may be used in an amount not to exceed 3 percent of the total ingredients used.

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Subpart G—Cooked, Smoked Sausage

§ *319.180 Frankfurter, wiener, vienna, bologna, garlic bologna, knockwurst, and similar products.*

"Frankfurter," "Wiener," "Vienna," "Bologna," "Garlic Bologna," "Knockwurst," and similar sausages are comminuted semisolid meat food products which are prepared from one or more kinds of meat or meat and meat byproducts, poultry products, and other ingredients as permitted by this section, seasoned and cured using one or more of

the curing agents in accordance with § 318.7(b) of this subchapter. The finished products shall not contain more than 30 percent fat. Water and/or ice may be used to facilitate chopping or mixing or to dissolve the curing ingredients, but the sausage shall contain no more than 10 percent of added water. One or more of the following binders or extenders may be used, which individually or collectively shall not exceed 3½ percent of the total ingredients in the sausage, except that 2 percent of isolated soy protein shall be deemed to be the equivalent of 3½ percent of any one or more of the other binders: dried milk, nonfat dry milk, calcium reduced dried skim milk, cereal, vegetable starch, starchy vegetable flour, soy flour, soy protein concentrate, and isolated soy protein. Partially defatted pork fatty tissue or partially defatted beef fatty tissue or a combination of both may be used in an amount not exceeding 15 percent of the meat and meat byproduct ingredients. These products may contain uncooked cured pork which does not contain any phosphates or contains only phosphates approved under Part 318 of this subchapter. These sausage products also may contain poultry products which, individually or in combination, are not in excess of 15 percent of the total ingredients excluding water, in the sausage. Such poultry products must be free of kidneys and sex glands, and the amount of skin present must not exceed the natural proportion of skin present on the whole carcass of the kind of poultry used in the sausage, as specified in the regulations under the Poultry Products Inspection Act (7 CFR 81.131 (g)). For purposes of this subparagraph, poultry products means chicken or turkey, chicken or turkey meat, or chicken or turkey byproducts as defined in the regulations under the Poultry Products Inspection Act (7 CFR Part 81). They shall be designated in the ingredient statement on the label of such sausage

in accordance with the provisions of said regulations. Sausage products within this section if labeled "all meat" shall contain only beef, pork, veal, mutton, lamb, or goat meat, or chicken or turkey meat (without skin but otherwise as provided in this section), or any combination thereof, and condiments, curing agents and water as permitted by this section and § 318.7 of this subchapter. If labeled "all (species)," e.g., "All Beef Franks" or "All Pork Franks," these sausages shall contain only meat of the specified species, with condiments, curing agents, and water as permitted by this section and § 318.7 of this subchapter.